STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0426

State of Minnesota,
Respondent,

vs.

Brian Michael Garner,
Appellant.

Filed September 18, 2023
Affirmed
Worke, Judge
Dissenting, Ross, Judge

Itasca County District Court
File No. 31-CR-21-2347

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Matti R. Adam, Itasca County Attorney, David S. Schmit, Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Ross, Judge; and Smith, John P., Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant argues that the district court erred by denying his petition for postconviction relief seeking to withdraw his guilty plea because defense counsel was ineffective for failing to investigate and advise him of a prescribed-use defense to his first-degree driving-while-impaired (DWI) charge. We affirm.

FACTS

Respondent State of Minnesota charged appellant Brian Michael Garner with first-degree DWI, criminal vehicular operation, fleeing a peace officer in a motor vehicle, and driving after cancelation. *See* Minn. Stat. §§ 169A.20, subd. 1(7), .24(2), 609.2113, subd. 1(6), 609.487, subd. 3, 171.24, subd. 5 (2020). Garner entered *Norgaard* pleas[1] to first-degree DWI and fleeing a peace officer in a motor vehicle, claiming that "drugs" caused him to "blackout" at the time of the offenses. The state noted that blood testing performed by the Minnesota Bureau of Criminal Apprehension (BCA) showed amphetamine in Garner's blood at the time of the offenses. Garner understood that, by pleading guilty, he was "giving up any defenses." The district court sentenced Garner according to the plea agreement to concurrent sentences of 65 months in prison for the DWI conviction and 22 months for the fleeing conviction.

[1] A defendant enters a *Norgaard* plea when he "asserts an absence of memory on the essential elements of the offense but pleads guilty because the record establishes, and the defendant reasonably believes, that the state has sufficient evidence to obtain a conviction." *Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009), *rev. denied* (Minn. Apr. 21, 2009); *see also State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 871 (Minn. 1961).

Garner appealed, but this court stayed the appeal for Garner to seek postconviction relief. In his postconviction petition, Garner requested to withdraw his guilty plea, claiming that it was invalid because his attorney failed to investigate a prescribed-use defense to the DWI charge.

At an evidentiary hearing, Garner testified that he had a prescription for Vyvanse and was using it as prescribed during the offenses. Garner testified that he asked his trial counsel to investigate the amphetamines that would show up in his blood because of his use of Vyvanse. Garner recalled signing a release of information for trial counsel to investigate the prescription. Garner testified that had trial counsel investigated a prescribed-use defense, he would not have pleaded guilty.

But Garner also testified that he did not understand that the prescription was relevant to his case. He also failed to provide a copy of his prescription at the hearing. And he shifted his explanations regarding why he did not produce a copy, first claiming that the pharmacy would not give him a copy and then claiming that he failed to obtain a copy because he was in prison. He also admitted that he had not asked his postconviction counsel to obtain a copy of his prescription.

Garner's trial counsel testified that he and Garner demanded a speedy trial believing that the state would not have the BCA test results in time for trial. Trial counsel noted that Garner told him that the results would show "Vyvanse . . . and marijuana" but Garner did not state that Vyvanse would show in the report as an amphetamine. Trial counsel testified that Garner never gave him "any information about a Vyvanse prescription" or that Garner ever made him "aware" that "there existed a prescription" for Vyvanse.

Trial counsel testified that he discussed with Garner that he planned to review the BCA test results to determine whether there was a viable defense of "intoxication by a prescription drug." Based on police reports and videos from the squad-car cameras showing "multiple indicia of intoxication," however, it appeared unlikely that Garner was under only "therapeutic levels of . . . [a] controlled substance."

Trial counsel testified that he previously investigated how Vyvanse would appear on a drug test in a prior case with similar facts. Based on his experience, trial counsel testified that it would "take a tremendous amount of time" to locate an expert who would conclude "that the amount of drugs in" Garner's body was "within a therapeutic range" to establish a prescribed-use defense. He explained that it was difficult to find an expert because every prescription is unique and the affirmative defense requires a showing that the defendant was taking the medication as prescribed. But trial counsel testified that he never contacted the BCA scientist who performed Garner's blood test. And in an email to Garner's postconviction counsel, the BCA scientist stated that the concentration of amphetamine in Garner's blood was "within the therapeutic range for . . . amphetamine."

Trial counsel testified that he and Garner discussed the prescribed-use defense immediately prior to tendering a plea of guilty. Trial counsel and Garner discussed the pros and cons of using the blood-test results versus using a speedy-trial-demand tactic in hopes of receiving a better plea offer. Trial counsel testified that the initial plea offers required Garner to plead guilty to "at least" first-degree DWI with a guideline sentence or a top-of-the-box sentence, because of the "egregious facts." Trial counsel testified that Garner leveraged the speedy-trial-demand tactic and received a better plea offer.

Trial counsel also testified that he warned Garner about the county attorney's practice of revoking offers if the defendant raised contested omnibus issues or went to trial. Trial counsel advised Garner that if the offer was revoked, Garner could spend months longer in a "condemned jail" while trial counsel "tried to come up with a different defense that [he] didn't think was viable in the first place." Trial counsel testified further that before pleading guilty at the plea hearing, he and Garner discussed whether to proceed as planned or "do something different[]" such as investigate a prescribed-use defense.

The district court denied Garner relief, concluding that Garner failed to show "a reasonable probability that the outcome would have been different" had counsel not made the alleged error because Garner provided "no evidence of a prescription." This appeal followed.

DECISION

Garner argues that his counsel was ineffective because he failed to investigate Garner's prescription and advise him of a prescribed-use defense to DWI. Because of the ineffective representation, Garner claims that his guilty plea is invalid and he must be allowed to withdraw it.

When, as here, a defendant files a direct appeal and then has it stayed to pursue postconviction relief, we review the postconviction court's decision using the same standard as applied on direct appeal. *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). We review legal questions on ineffective-assistance-of-counsel claims de novo. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). We similarly review the validity of a guilty plea de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). But we "give great

deference to a district court's findings of fact." *State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010). We will not set aside factual findings unless they are clearly erroneous. *Id.* Factual findings are not clearly erroneous if "reasonable evidence" supports them. *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (quotation omitted). A postconviction petitioner bears the burden of proving the facts warranting relief by a fair preponderance of the evidence. Minn. Stat. § 590.04, subd. 3 (2022).

A guilty plea may be invalid if the defendant received ineffective assistance of counsel. *State v. Ellis-Strong*, 899 N.W.2d 531, 535-36 (Minn. App. 2017). To establish an ineffective-assistance-of-counsel claim in the context of a guilty plea, the defendant must show that "counsel's representation fell below an objective standard of reasonableness, and . . . a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 536 (quotation omitted). To establish an ineffective-assistance claim, the defendant must meet both prongs. *See State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Garner claims that he pleaded guilty only because his trial counsel failed to investigate and advise him of a prescribed-use defense to DWI.

Availability of defense

It is a crime for a person to drive a motor vehicle with "any amount of a controlled substance listed in Schedule I or II." Minn. Stat. § 169A.20, subd. 1(7). But it is an affirmative defense when the defendant used the controlled substance according to the terms of a prescription issued for the defendant. Minn. Stat. § 169A.46, subd. 2 (2022). Because the DWI charge was based on the presence of amphetamine in Garner's blood, the

prescribed use of Vyvanse—which contains amphetamine—may have established a defense. *See* Minn. Stat. § 152.02, subd. 3(d)(1) (2020) (making "amphetamine" a Schedule II controlled substance).

Trial counsel's representation

Having determined that the prescribed-use defense may have been available to Garner, we must next determine whether Garner showed that his attorney was ineffective for failing to investigate and advise him of the defense.

There is a strong presumption that counsel's performance was reasonable. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). "An attorney's representation meets the objective standard of reasonableness if the attorney exercises the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances." *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016).

Counsel's investigation into a defense is considered trial strategy. *See Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). While we generally decline to review challenges to trial counsel's strategy, *id.*, the failure to investigate a defense may constitute unreasonable representation if the failure was due to "inattention or neglect." *Swaney*, 882 N.W.2d at 218. But even an incomplete investigation is objectively reasonable if supported by the circumstances or if counsel made a reasoned decision that made further investigation unnecessary. *Id.* In reviewing counsel's investigation into a defense, we assess trial counsel's conduct "under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (quotations and

citation omitted). Our review "must be highly deferential" to counsel's performance. *Rhodes*, 657 N.W.2d at 844 (quotation omitted).

Here, we cannot conclude that trial counsel was neglectful in his investigation or in advising Garner about the prescribed-use defense. The record shows that trial counsel and Garner demanded a speedy trial in a strategic move, believing that the state would not have the test results in time for trial. Trial counsel had used this strategy in other cases.

After they received the blood-test results on the eve before trial, trial counsel discussed with Garner the pros and cons of "doing something" with the test results, i.e. investigating further into a prescribed-use defense. But Garner never provided his trial counsel with "any information about a Vyvanse prescription" or made his counsel "aware" that "there existed a prescription" for Vyvanse. As the district court concluded: "[Garner] has not produced verification of an existing prescription for Vyvanse, medical marijuana, nor any other medication, in place at the time of the offenses or any time prior to the offenses." Without a prescription, there is no evidence of the prescribed use and there is no affirmative defense.[2] *See e.g., Grover-Tsimi v. State*, A11-979, 2012 WL 34056, *5 (Minn. App. Jan. 9, 2012) (concluding that attorney was not ineffective for failing to present affirmative defense that disorderly conduct was caused by epileptic seizure because appellant does not have epilepsy).

[2] Under the affirmative-defense statute, there must be evidence of (1) a current prescription and (2) use in accordance with the terms of that prescription. *See* Minn. Stat. § 169A.46, subd. 2 (stating that impairment-from-prescription-drug defense is available only if it is "proven by a preponderance of the evidence . . . that the defendant used the controlled substance according to the terms of a prescription issued for the defendant").

Trial counsel had experience from a prior case with similar facts and knew that locating an expert to testify regarding whether the substances in the sample were within a therapeutic range would be difficult. Similarly difficult would be finding an expert to show that Garner was taking the medication as prescribed. And counsel believed that, based on his review of police reports and videos from the squad-car cameras showing "multiple indicia of intoxication," it was unlikely that Garner was under only "therapeutic levels of . . . [a] controlled substance." Trial counsel considered the defense even though Garner never provided an actual prescription.

Trial counsel discussed the defense with Garner, but rather than proceed with trial and raise the defense, they decided to use the leverage from demanding a speedy trial to obtain a better plea offer. Garner received a "good" offer with a bottom-of-the-box presumptive sentence for the felony-DWI offense.

The dissent suggests that we "overlook[ed] the district court's unfavorable treatment of [trial counsel's] testimony," and that we "credited the testimony as if the attorney in fact discussed the defense with Garner, [while] the district court refused to do so." The dissent assumes that the district court refused to credit trial counsel's testimony that he and Garner discussed the prescribed-use defense. The district court found:

> [Trial counsel] provided conflicting testimony regarding whether he and [Garner] even thoroughly discussed an affirmative prescription defense. He indicated that the matter was discussed during an off-record conversation during the plea hearing, but he immediately contradicted himself in then asserting that he "was unaware of any prescription for either Vyvanse or marijuana."

The district court did not "refuse" to credit trial counsel's testimony that he *discussed* the possibility of the defense with Garner; rather, it found trial counsel's testimony conflicting only as to whether they discussed it *thoroughly*. Not having a thorough discussion does not mean a discussion did not occur. As trial counsel testified, and the district court credited, trial counsel did not believe the prescribed-use defense was viable because of difficulties his office had experienced with the defense in an analogous case and because of discovery showing Garner displaying "multiple indicia of intoxication" that he did not believe would have been the result of prescribed usage.

Trial counsel was aware, based on his experience with the county attorney, that if Garner continued with a contested omnibus hearing, the offer would have been revoked. Trial counsel advised Garner that if the offer were revoked, Garner would likely spend months "in [a] condemned jail" while they considered a defense that was not likely viable. Additionally, trial counsel considered that if the offer were revoked, Garner could face potential consecutive sentences. Trial counsel discussed with Garner that the facts of the case—Garner fled for a significant distance, drove in excess of 100 miles per hour, and crashed his vehicle carrying a passenger who suffered severe injuries—could expose him to consecutive sentences. At the plea hearing, Garner confirmed that he wanted to plead guilty rather than raise a defense.

Considering the deference afforded to counsel, and his perspective at the time, including his experience with a prior case with analogous facts, his experience with the county attorney, and his understanding of the facts and potential sentencing, we cannot conclude that counsel provided objectively unreasonable representation. Counsel did not

neglect to investigate the defense; rather, after advising Garner of the relevant circumstances, they reasonably decided to proceed with leveraging the speedy-trial demand. Garner fails to show that his counsel's performance fell below an objective standard of reasonableness.

Prejudice

Although we have concluded that trial counsel's representation was not constitutionally ineffective and could conclude our analysis here, we also determine that Garner fails to show prejudice.

There is no presumption of prejudice in an ineffective-assistance-of-counsel claim. *Gates v. State,* 398 N.W.2d 558, 562 (Minn. 1987). Rather, Garner must show that "but for [counsel's] errors the result of the proceeding probably would have been different." *Rhodes*, 657 N.W.2d at 842 (quotation omitted). Specially, Garner must show that he would not have pleaded guilty without trial counsel's alleged error. *See Ellis-Strong*, 899 N.W.2d at 540.

Garner seems to claim that the district court legally erred by concluding that, because Garner failed to present a prescription, he failed to show prejudice. The district court stated that Garner produced no "verification" of a prescription, and that his "mere assertion" that the prescription existed did not show prejudice. It is "implicit in these findings" that the district court discredited Garner's testimony regarding the alleged Vyvanse prescription, and that Garner therefore failed to prove that he had such a prescription without extrinsic evidence of it. *See State v. Blom*, 682 N.W.2d 578, 619 (Minn. 2004) (concluding that postconviction credibility findings were implicit in district

court's determination that appellant did not show prejudice to support ineffective-assistance claim). The district court's credibility finding is entitled to deference. *See Evans*, 756 N.W.2d at 870.

The BCA scientist's statement that a potentially therapeutic amount of amphetamine was in Garner's blood does not undermine the district court's credibility determination. Having a therapeutic range of amphetamine in one's system does not mean that a prescription existed for the medication. The dissent notes that "the postconviction attorney who *did* investigate learned from the same scientist that this amount was 'within the therapeutic range for amphetamine.'" Yet the postconviction attorney did not acquire any prescription. Garner testified that his postconviction counsel spoke with the doctor who prescribed him Vyvanse "about [his] prescription medication," but Garner did not testify that his postconviction counsel and the doctor discussed any Vyvanse prescription.

Garner also fails to explain why he would have insisted on raising a prescribed-use defense instead of pleading guilty when he failed to prove that he had a prescription to support the defense. Garner's conclusory testimony that he would not have pleaded guilty "[b]ecause the facts and [his] rights would have been proved" seems to change nothing on this point. *See Lee v. U.S.*, 582 U.S. 357, 369 (2017) ("Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences."). Without proving that he had a Vyvanse prescription, Garner cannot show prejudice. *See State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (holding that appellant failed to show prejudice to support

guilty-plea withdrawal based on alleged ineffective assistance in failing to investigate possible exculpatory witnesses and defenses when appellant did not "show [that] witnesses would have been found" or that "any defense . . . was realistic or appropriate under the facts of his case"); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("[W]he[n] the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense . . . , the . . . 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.").

Garner does not dispute that trial counsel advised him that the plea offer he accepted was "objectively good." He also does not dispute that trial counsel advised him that he would go to prison if convicted on at least the first-degree DWI and would likely face consecutive sentences. The presumptive sentence for first-degree DWI, calculated with Garner's 12 criminal-history points, was 72 months in prison (62 months-84 months range). *See* Minn. Sent'g Guidelines 4.A (2021). The other top charges also carried presumptive prison sentences and each charge was eligible for consecutive sentencing. If the first-degree DWI were sentenced based on that criminal-history score and the other charges were sentenced consecutively, Garner could have faced a significantly longer sentence than he received with the plea agreement.

The plea offer accepted by Garner appears relatively favorable compared to prior offers and other sentencing scenarios, which supports a lack of prejudice. *See Lee*, 582 U.S. at 367 (noting that "[t]he decision whether to plead guilty . . . involves assessing the respective consequences of a conviction after trial and by plea").

Given these considerations, even if Garner's failure to prove that he had a Vyvanse prescription does not alone defeat his claim of prejudice, the fact that he was offered a favorable plea following counsel's speedy-trial-demand tactic does. Based on this record, Garner fails to show that his trial counsel was ineffective. The district court did not err by denying Garner's petition for postconviction relief.

Affirmed.

ROSS, Judge (dissenting)

The first time Brian Garner met his attorney, he gave the attorney all the information necessary to reveal that the evidence might support a complete defense to the most serious charge Garner faced. The attorney did nothing with that information and instead left Garner to plead guilty to the charge even after he received the forensic evidence that supported the defense. Because I am certain that failure to investigate or pursue the defense constitutes ineffective assistance of counsel, I respectfully but strongly dissent.

Four simple circumstances present a basic legal question. First, a lawyer began representing a defendant charged with impaired driving for having allegedly driven a car after using methamphetamine. Second, the defendant repeatedly informed his lawyer that he had not, in fact, used methamphetamine but had instead taken a named medication regularly prescribed for a common attention disorder. Third, the law establishes that a person who drives after having taken medication as medically prescribed is not, by virtue of that conduct, guilty of impaired driving. And fourth, forensic laboratory testing confirmed that the defendant indeed had not used methamphetamine but had ingested a drug having the same chemical qualities as the medicine he told the lawyer he ingested, in a dosage consistent with therapeutic use. The legal question is whether a lawyer armed with this information provides adequate legal representation if he fails to do any of these things: advise the defendant that the absolute defense of prescribed-use might be available to avert an impaired-driving conviction altogether; investigate whether the defendant could testify or provide other evidence that he had been prescribed the drug; or advise the defendant not to hastily plead guilty to impaired driving and disclose to the state the

plausible affirmative defense to leverage a more favorable plea offer on remaining, lesser charges. I believe that the only answer is no. I therefore disagree with the majority's holding that these failures were justified by the lawyer's insightful "perspective at the time" as part of some strategic plan to "use the leverage from demanding a speedy trial to obtain a better plea offer." I also dissent from the majority's holding that, because the defendant "was offered a favorable plea following counsel's speedy-trial-demand tactic," he somehow was not prejudiced by his lawyer's failure to adequately pursue the potential complete defense.

The state charged Garner with four criminal offenses: first-degree driving while impaired, criminal vehicular operation, fleeing a peace officer in a motor vehicle, and driving with a canceled driver's license. The impaired-driving charge was the most serious, exposing Garner to the longest presumptive prison term. The state based that charge on its allegation that Garner had driven a motor vehicle after using methamphetamine. But Garner knew that he could not be guilty of impaired driving under that theory, because he had not ingested methamphetamine. And that's exactly what he told his attorney the first time they met and repeatedly after that. Garner told his attorney that he had ingested an amphetamine in the form of Vyvanse (which is a prescription drug for the treatment of Attention-Deficit/Hyperactivity Disorder (ADHD)) and marijuana (which Garner told his attorney he had been medically prescribed and which cannot form the basis of the impaired-driving offense as charged). If what Garner told his attorney about having consumed Vyvanse and not methamphetamine was true, then Garner had not engaged in impaired driving by virtue of using methamphetamine. Garner was also certain that the laboratory

tests would confirm his assertion that he had ingested Vyvanse, not methamphetamine, and he so informed his lawyer. And as the district court found, Garner "recalls signing releases of information in order to facilitate [his attorney's] investigation of the prescription."

But the attorney never investigated whether Garner was prescribed Vyvanse or whether his use was within a prescribed range. The district court explained away the omission: "Given the difficulties his office had in an analogous case, [the attorney] saw any prospective affirmative defense involving prescription drugs as laborious, if not impossible." The district court based this finding on the attorney's testimony that, in a case he co-chaired, "we had repeatedly struck out in trying to find someone in that case, an expert [who] would testify . . . that this amount of . . . drugs in this person's system was . . . like within the therapeutic range . . . such that we could use that defense." The district court's explanation, like the majority's adoption of it, fails to incorporate the facts of *this* case. In this case, the forensic scientist who completed the forensic testing expressly reported the amount of amphetamine in Garner's system; and the postconviction attorney who *did* investigate learned from the same scientist that this amount was "within the therapeutic range for . . . amphetamine."

And unlike the majority's description of events, the record also does not establish that the attorney ever even *discussed* the prescribed-use defense with Garner. The majority frequently references the attorney's representation to the district court that he discussed the defense with Garner. But these references overlook the district court's unfavorable treatment of this testimony. Although the majority credits the testimony as if the attorney in fact discussed the defense with Garner, the district court refused to do so. The district

court instead found that the attorney "provided conflicting testimony regarding whether he and [Garner] even thoroughly discussed an affirmative prescription defense. He indicated that the matter was discussed during an off-record conversation during the plea hearing, but he immediately contradicted himself . . . ." By basing its reasoning on facts that the district court deliberately never found and indeed expressly doubted, the majority builds its legal conclusions on marshy ground. My dissent by contrast rests on defense counsel's failure to investigate and adequately advise Garner on the prescription-use defense as it bears on Garner's guilty plea.

The state did not wait for the lab results to pitch Garner a deal: plead guilty to first-degree driving while impaired and fleeing a peace officer in a motor vehicle and the state would drop the other two charges. It seems to me that Garner's attorney then had viable strategic options. He could have advised Garner not to immediately accept the plea offer while he promptly investigated whether the prescribed-use defense could thwart the state's impaired-driving charge altogether. A reasonable investigation would entail, at the very least, informing Garner about the prescribed-use defense, verifying that Garner would testify (with or without documentary evidence) that he was prescribed the Vyvanse he claimed to have ingested, and waiting for the lab results to determine whether the forensic evidence supported Garner's assertion that he had ingested only Vyvanse, not methamphetamine, and that he did so in a dosage that supported therapeutic rather than recreational use.

Under this approach, if it turns out (as it in fact did turn out) that the lab results confirmed what Garner had represented, the attorney could then move (or threaten to move)

the district court to dismiss the impaired-driving charge for lack of evidence or negotiate a better plea deal on the strength of the potential complete defense. Or he could simply recommend that Garner reject the plea offer and prepare for trial, knowing that the impaired-driving charge stood on unsteady legs given Garner's anticipated testimonial evidence that he took only a prescription drug and the corroborating scientific evidence supporting therapeutic use. A more aggressive strategic option would include disclosing the potential defense to the state and counter-offering a more favorable plea deal without awaiting the test results. Other viable options existed, and I need not outline them all. My point is that the only clearly *indefensible* option is the one taken—ushering Garner to quickly plead guilty while doing nothing with the prescribed-use evidence.

The majority says, "The record shows that trial counsel and Garner demanded a speedy trial in a strategic move, believing that the state would not have the test results in time for trial. Trial counsel had used this strategy in other cases." This reasoning is sound only in one sense but clearly flawed as applied here. I say this because it simply doesn't matter that counsel "believ[ed] that the state would not have the test results in time for trial." Nor does it matter that he "had used this strategy in other cases." In *this* case, the state in fact *did* receive the test results before the time set for trial. No one can deny the rationality of using an early speedy-trial demand to pressure the state into a choice of either offering the defendant an attractive deal to elicit a guilty plea or possibly having to prove a chemical-use charge with no scientific chemical-use evidence. But a defense attorney's theoretical strategy of making a speedy-trial demand is immaterial to our question, which is whether Garner's attorney provided effective assistance of counsel in light of the

potential prescribed-use defense given the information and evidence available before and after the state made its plea offer. The majority does not—and I believe cannot—identify any plausible strategic benefit from failing to take any steps to investigate the merit of the defense, or at least raise the possibility of the defense with the prosecutor to renegotiate the plea deal after the lab results corroborated Garner's statements. The omission led Garner to plead guilty to a crime for which the defense might have proven completely dispositive.

In sum, I am confident that there is no "strategy" justification for counsel's failure under the full, pre-plea picture. Garner had advised his attorney that the drugs in his system were not methamphetamine, and the forensic evidence supported this claim. Garner had advised his attorney that the drugs in his system were amphetamine, and the forensic evidence supported this claim. The prescribed-use defense is available if the defendant used the drug as prescribed, and the forensic evidence supported a claim of use in a therapeutic quantity. If Garner's attorney had simply asked Garner whether he had been prescribed the drug, and Garner answered by telling his attorney what he later told the district court in his postconviction testimony, the attorney could have used the information to effectively represent Garner's interests in advising him whether to plead guilty under the terms the state offered. I believe that counsel's performance fell below an objective standard of effective representation.

I also believe that Garner has established that, but for his attorney's failure to investigate and apply the prescribed-use defense, he would not have pleaded guilty. "[T]o satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have

insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (quotation omitted). Where, as here,

> the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Id. Garner has made the required showing that he would not have pleaded guilty to impaired driving had his attorney properly investigated and applied the defense. The only direct evidence on this point is plain in the postconviction record:

> Attorney: Do you believe you would have pleaded guilty if your attorney had investigated the defense?
>
> Garner: No.
>
> . . . .
>
> Attorney: And I should clarify; do you believe you would have pleaded guilty [pursuant] to this plea agreement, to the felony DWI?
>
> Garner: No.

The district court concluded that Garner was not prejudiced by the failure to pursue the possible prescribed-use defense, but it did so entirely on the following improper reasoning:

> If [the attorney] had obtained information from the prescriber to confirm or deny the allegation of [Garner], then this proceeding would not have been necessary. However, that is dependent upon the provider actually providing the

> information. . . . Ten months post sentencing, no evidence of a prescription has been provided. . . . [Garner] has testified to an alleged prescription, naming the facility, provider, and dosage, and nothing more. The mere assertion of the existence of the prescription does not show that the error would have made any difference in the outcome. . . . [Garner] has not met his burden to show that there is a reasonable probability that the outcome would have been different.

Not only did the district court apply the wrong legal reasoning, its foundational premise that "no evidence of a prescription has been provided" is also clearly erroneous. Testimony is evidence. And Garner testified that Vyvanse is his "ADHD medication," that "Rhea [del Rosario] from Lakeview Behavioral Mental Health" prescribed the medication to him, that he was prescribed the medication "in August . . . [of] 2021," that his prescribed dosage was "30 milligram[s]" initially and increased "to 50" milligrams "two weeks" later "because the value . . . wasn't high enough," that he had the prescription "filled . . . [at] Walgreen's," that he was on the medication "at the time of the offense," and that "[I] wasn't abusing [the] medication" but "was taking it as prescribed . . . every day . . . at the same time." The district court treats this detailed, sworn testimony as a "mere assertion of the existence of the prescription" rather than as specific evidence of a prescription, which it certainly is, regardless of whether the district court believes it.

Most critical to our review on appeal, the district court made no factual finding that Garner would have pleaded guilty to impaired driving had his attorney properly investigated and advised him about the potential defense. The majority ignores the lack of a fact-finding on this point and implicitly finds on its own that Garner certainly would have pleaded guilty to impaired driving even if the defense had been properly investigated,

explained to him, and applied. I disagree with this approach for two reasons. First, it is not our prerogative to find facts on appeal, as this is a duty left solely to the district court in postconviction proceedings. *See Scruggs v. State*, 484 N.W.2d 21, 24 (Minn. 1992) ("The *postconviction court* makes findings and conclusions to facilitate appellate review." (emphasis added)). Because the district court did not make the finding against Garner, we should not resolve the appeal as if it had.

And second, I disagree with the reasoning in the majority's fact-finding. The majority reasons that "Garner . . . fails to explain why he would have insisted on raising a prescribed-use defense instead of pleading guilty when he failed to prove that he had a prescription to support the defense." Here the majority seems to fall on the same mistake that misled the district court. What matters here is not whether the district court or this court believes that Garner had a prescription to support the defense, but whether Garner believed he had evidence that could convince a jury at trial that he had a prescription to support the defense. *See State v. Ellis-Strong*, 899 N.W.2d 531, 536 (Minn. App. 2017). Again, his postconviction testimony on this issue was detailed and precise, and it was sufficient to constitute evidence of a prescription with or without documentation. Put differently, it is Garner's informed understanding of what a jury might believe about the defense at trial that bears on whether he would have pleaded guilty to impaired driving, and whether the postconviction court believed he had a prescription is wholly irrelevant.

Garner testified that, had his understanding been informed by his attorney's investigation, he would not have pleaded guilty. Nothing in the record or logic undermines that claim. I do not join the majority's assertion that Garner "fails to explain why he would

have insisted on raising a prescribed-use defense instead of pleading guilty." We do not need Garner to explain why he would have raised the evidentially supported defense to impaired driving instead of pleading guilty to impaired driving, because the explanation is self-evident. The more obvious and relevant question is, why *wouldn't* he raise the defense?

The majority is persuaded that Garner suffered no prejudice by his attorney's failure to investigate because "Garner received a 'good' offer with a bottom-of-the-box presumptive sentence for the felony-DWI offense." But we can call the sentencing offer "good" only by assuming that Garner would have pleaded guilty to impaired driving in the face of an informed decision about the defense against the impaired-driving charge. The record lacks the necessary finding that he would have pleaded guilty, and I cannot join in the assumption.

I would reverse the postconviction decision, allowing Garner to withdraw his guilty plea and to seek a different deal or proceed to trial on the merits on all counts.